

**NOTICE OF ARBITRATION AND STATEMENT OF CLAIM  
PURSUANT TO THE CENTRAL AMERICA—DOMINICAN REPUBLIC—  
UNITED STATES FREE TRADE AGREEMENT**

**TCW GROUP, INC.**

**CLAIMANT,**

**VERSUS**

**THE DOMINICAN REPUBLIC**

**RESPONDENT.**

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**NOTICE OF ARBITRATION AND STATEMENT OF CLAIM**

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**21 December 2007**

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## **I. INTRODUCTION**

1. This Notice of Arbitration and Statement of Claim (“Statement of Claim”) is submitted on behalf of TCW Group, Inc. (“Claimant” or “TCW”) in accordance with Chapter 10 of the Central America-Dominican Republic-United States Free Trade Agreement (“CAFTA-DR”), which entered into force on March 1, 2007. *See* Exhibit 1 (attached hereto).<sup>1</sup> The Respondent, the Government of the Dominican Republic (the “Republic”), has consented to resolve its dispute with the Claimant via arbitration pursuant to Article 10.17 of CAFTA-DR.
2. TCW hereby selects the Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Arbitration Rules”), as provided for under CAFTA-DR Article 10.16.3(c).<sup>2</sup> TCW serves this Statement of Claim in conformity with the UNCITRAL Arbitration Rules, except where expressly modified by CAFTA-DR.<sup>3</sup>

## **II. THE PARTIES TO THE ARBITRATION AND RELATED ENTITIES**

3. The Claimant in the above-referenced arbitration (the “Arbitration”) is TCW, a leading global financial services company. TCW’s principal address is 865 South Figueroa

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<sup>1</sup> All portions of CAFTA-DR Chapters (including the preamble) that are referenced or quoted in this Statement of Claim are attached as Exhibit 1.

<sup>2</sup> CAFTA-DR Article 10.16.3 provides that a claimant may submit a dispute for resolution under CAFTA-DR pursuant to (1) the ICSID Rules of Procedures for Arbitration Proceedings (if both the Party of the claimant and the respondent are members of ICSID, which the Republic is not), (2) the ICSID Facility Rules, or (3) the UNCITRAL Arbitration Rules.

<sup>3</sup> CAFTA-DR Article 10.16.5 states that “[t]he arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.” Article 1(2) of the UNCITRAL Arbitration Rules likewise provides that “[t]he Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”

Street, Los Angeles, California, 90017, United States of America. TCW's place of incorporation is Nevada, United States of America.

- a. TCW is an indirect owner of Empresa Distribuidora de Electricidad del Este, S.A. ("EDE Este"), a joint venture created in the Republic in 1999 between the Republic and a foreign investor, AES Distribución Dominicana Ltd. ("AES Distribución"), to serve as one of three electricity distribution companies in the Republic.
- b. In 1999 and thereafter, AES Distribución invested approximately US\$279.8 million in EDE Este as part of the capitalization and reform of the Republic's energy sector, and in return became a 50% owner of EDE Este.
- c. In November 2004, AES Corporation, the parent of AES Distribución, sold 100% of the shares of AES Distribución to Dominican Energy Holdings LP, a company that TCW indirectly owns.<sup>4</sup>
- d. TCW then renamed AES Distribución DR Energy Holdings Ltd. ("DREH"), and DREH continues as the controlling shareholder and 50% owner of EDE Este.

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<sup>4</sup> Throughout this Statement of Claim, this company will generally be referred to by its present name, DREH, and not by its former name, AES Distribución.

4. TCW is represented in this Arbitration by:

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All communications to the Claimant in this Arbitration should be made to Paul, Hastings, Janofsky & Walker LLP at the above-referenced address.

5. The Respondent is the Republic. CAFTA-DR Article 10.1.2 provides that “[a] Party’s obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.”<sup>5</sup> The Republic has violated CAFTA-DR both directly and through its instrumentalities and related state enterprises and entities. These instrumentalities and related state enterprises and entities include, but are not limited to:

- a. The Corporación Dominicana de Electricidad (the “CDE”). The CDE was a state-owned corporation organized under the laws of the Republic and a party to the Subscription and Concession Agreements (as described below) before its responsibilities were passed to the CDEEE, as described below. These agreements established, in conjunction with various related contracts, the CDE’s 50% ownership of EDE Este. The CDE’s obligations have the unlimited

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<sup>5</sup> A “state enterprise” is defined under CAFTA-DR Article 2.1 as “an enterprise that is owned, or controlled through ownership interests, by a Party.”

guarantee of the Government of the Dominican Republic.<sup>6</sup> As set forth immediately below, after the enactment of Law 125-01, the CDE relinquished certain relevant obligations to the CDEEE.

- b. The Corporación Dominicana de Empresas Eléctricas Estatales (the “CDEEE”). The CDEEE is a state-owned entity created pursuant to Article 138 of Law 125-01 and organized under the laws of the Republic. Pursuant to Law 125-01, the CDEEE inherited certain functions and capacities of the former CDE. *See* Law 125 Article 138. The CDEEE’s formal address is Avenida Independencia, esq. Fray Cipriano de Utrera, Centro de los Héroes de Constanza, Maimón y Estero Hondo, Santo Domingo, Dominican Republic.
- c. The Superintendencia de Electricidad (“SIE”). The Republic created the SIE to serve as one of the entities responsible for fulfilling the public function of regulating the Republic’s electricity sector. The SIE is in charge of fixing the tariffs and tolls subject to price regulation. The SIE’s formal address is Calle Gustavo Mejía Ricart, No. 73, esq. Agustín Lara, Seralles, Quinto Piso, “Edificio CREP,” Santo Domingo, Dominican Republic.

### **III. GENERAL NATURE OF THE CLAIM**

6. The Claimant brings this action to remedy the Republic’s continuing wrongful conduct, which has continued unabated from the time preceding TCW’s purchase of the

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<sup>6</sup> *See* Article 1, CDE Organic Law of April 21, 1955; Corporación Dominicana de Electricidad Information Memorandum (Unofficial Translation), May 1998 (hereinafter “Information Memorandum”) at 138.

investment in November 2004 to the present and notwithstanding repeated representations and promises by the Republic that it would meet its obligations.

7. In an effort to attract and maintain foreign investment, the Republic has, from time to time, reaffirmed its commitment to the reforms in the electricity sector, but nevertheless refuses to implement them. Unfortunately, from the time of DREH's initial investment in 1998 to the Claimant's purchase of the investment in November 2004, and continuing through to the present, the Republic has engaged in a willful pattern of announcing and reaffirming reform in the electricity sector, only to renege and back-pedal later.
8. Claimant's claims are directed toward continuing acts and facts as well as other acts and facts that took place since March 1, 2007, which are specifically actionable under CAFTA-DR. These intentional, wrongful, willful and reckless continuing actions of the Republic regarding the Claimant's investments violate Claimant's rights as recognized under Chapter 10 of CAFTA-DR and international law.
9. The Republic's continuing actions include, but are not limited to:
  - a. its continual refusal to implement the legal and payment structures with respect to tariffs that the Republic has repeatedly established and promised to uphold;
  - b. denying EDE Este its right to compensation for the tariffs and subsidies that the Republic expressly promised;
  - c. effectively taking control of EDE Este, and depriving TCW of the value of its investment, by failing, from before January 2005 to the present, to fulfill promises to pay compensation for the promised tariffs and subsidies to EDE Este and instead treating any payments as loans or other accounts receivable, which EDE Este has been forced to carry as debt to the CDEEE;

- d. failing to implement its promise to keep the threshold for unregulated users at two megawatts;
- e. failing to enforce EDE Este's exclusive right to distribute electricity in the concession area granted to EDE Este;
- f. failing to implement its promise to make certain capital contributions to EDE Este;
- g. failing to use its sovereign power to effectively enforce existing laws criminalizing the theft of electricity and to provide EDE Este the legal protection necessary to collect its bills for electricity;
- h. aggravating the severe and continuing problem of the theft of electricity by unfairly and publicly attacking the distribution companies;
- i. engaging in and allowing systematic corruption to continue in the Republic's electricity sector, which has prevented EDE Este from operating under the terms of its contracts with the government and from collecting its bills for electricity;
- j. failing to regulate and administer the electricity sector with transparency and fairness under standards of fair and equitable treatment and customary international law;
- k. failing to adhere to the legal mechanisms established to resolve EDE Este's legitimate grievances concerning the Republic's wrongful actions with respect to tariffs and subsidies;
- l. engaging in wrongful conduct that has the effect of depriving DREH of its rightful control of EDE Este;

- m. refusing to accord the investment of TCW equal treatment with the investments of the Kingdom of Spain;
  - n. failing to treat the investment of TCW with the treatment as favorable as it accords to domestic investors and investments in like circumstances, by depriving EDE Este of the benefit of payments enjoyed by EDE Norte and EDE Sur following the Republic's re-nationalization of EDE Norte and EDE Sur;
  - o. launching an improper and illegal investigation of DREH by Dirección General de Impuestos Internos in retaliation for Claimant's efforts to protect its rights under international investment treaties; and
  - p. engaging in other retaliatory measures against EDE Este, including but not limited to interference with its business relationships.
10. In accordance with Articles 3(3)(e) and 18(2)(a) of the UNCITRAL Arbitration Rules, TCW's claims against the Republic include, but are not limited to, the Republic's ongoing violations of CAFTA-DR Articles 10.7 (Expropriation and Compensation), 10.4 (Most-Favored-Nation Treatment), 10.3 (National Treatment), and 10.5 (Minimum Standard of Treatment, including Fair and Equitable Treatment, Full Protection and Security, and customary international law).
11. The Republic's conduct since March 1, 2007 and its continuing intentional, wrongful, willful and reckless actions and omissions have caused catastrophic losses to EDE Este, the Claimant, DREH, and electricity consumers in the Republic.

**IV. THE BASIS FOR THE ARBITRATION, PRE-ARBITRATION NEGOTIATION AND CONSULTATION, CLAIMANT'S WAIVER OF RIGHTS, THE APPOINTMENT OF THE TRIBUNAL, THE APPLICABLE LAW AND THE LANGUAGE OF THE ARBITRATION**

**A. The Basis for the Arbitration**

12. TCW hereby requests arbitration of the dispute set forth herein pursuant to the investor-state dispute settlement provisions Chapter 10, Section B, of CAFTA-DR and in accordance with Articles 3(3)(a) and (3)(c) of the UNCITRAL Arbitration Rules.
13. Pursuant to Article 10.1 of CAFTA-DR, Chapter 10 of CAFTA-DR applies to measures adopted or maintained by a Party relating to certain "investors" and "covered investments" of another Party (the United States), as defined at CAFTA-DR Article 10.28. Claimant is clearly an "investor" of the United States as defined in Article 10.28 of CAFTA-DR with an "investment" as defined by that same Article.
14. Article 10.28 of CAFTA-DR defines "Investor of a Party" as:
- ... a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality[.] ...**
15. Claimant constitutes an "enterprise" incorporated in the United States in conformity with United States legislation, and Claimant's headquarters are located in the United States. In addition, EDE Este constitutes a legal entity incorporated in the Dominican Republic in accordance with its legislation and is controlled indirectly by Claimant, a national of the United States.
16. Claimant also possesses an "investment" as defined under CAFTA-DR by virtue of its ownership interest in EDE Este. Article 10.28 of CAFTA-DR defines "investment" as:

**. . . every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:**

- (a) an enterprise;**
- (b) shares, stock, and other forms of equity participation in an enterprise;**
- (c) bonds, debentures, other debt instruments, and loans;**
- (d) futures, options, and other derivatives;**
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;**
- (f) intellectual property rights;**
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and**
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges[.]<sup>7</sup>**

17. Claimant fulfills the requirements of, among others, CAFTA-DR Articles 10.28(b) and (g). First, Claimant indirectly owns 50% of the stock in EDE Este, a legal entity incorporated in the Republic in conformity with its legislation. Second, Claimant's controlling interest in the Concession Agreement by virtue of its controlling interest in EDE Este also clearly qualifies as Claimant's "investment" under CAFTA-DR. Third, Claimant's asset plainly possesses the characteristics of an investment, including, but not limited to, the expectation of gain or profit and the assumption of risk.

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<sup>7</sup> Internal footnotes omitted.

**B. Pre-Arbitration Consultation and Negotiation and Request for Arbitration**

18. Article 10.15 of CAFTA-DR (“Consultation and Negotiation”) provides:

**In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.**

19. For over 16 months, Claimant has attempted to resolve amicably its dispute with the Republic. Those efforts have failed. For example, on May 24, 2006, R. Blair Thomas, the President of EDE Este, sent a letter to the President of the Republic notifying him of the damages that EDE Este had suffered and was continuing to suffer as a result of the Republic’s past and ongoing intentional, wrongful, willful and reckless actions with respect to EDE Este. Since that time, and continuing through March 1, 2007, Claimant has undertaken numerous written and in-person communications and negotiations with the Republic, which have failed to resolve the issues raised by the Republic’s ongoing intentional, wrongful, willful and reckless violations or to remedy the damages that EDE Este, the Claimant, DREH, and electricity consumers in the Republic continue to suffer as a result of those violations.

20. Article 10.16 of CAFTA-DR (“Submission of a Claim to Arbitration”) provides in relevant part:

1. **In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:**
  - (a) **the claimant, on its own behalf, may submit to arbitration under this Section a claim**
    - (i) **that the respondent has breached**
      - (A) **an obligation under Section A,**
      - (B) **an investment authorization, or**
      - (C) **an investment agreement;**

and

(ii) **that the claimant has incurred loss or damage by reason of, or arising out of, that breach**

21. TCW brings claims on its own behalf pursuant to CAFTA-DR Article 10.16.1(a) for the Republic's violations of obligations under Section A, Chapter 10, of CAFTA-DR.

22. Article 10.16 of CAFTA-DR states in relevant part:

2. **At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:**

- (a) **the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;**
- (b) **for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;**
- (c) **the legal and factual basis for each claim; and**
- (d) **the relief sought and the approximate amount of damages claimed.**

23. On March 15, 2007, TCW submitted to the Republic a written notice of its intention to submit the claim to arbitration pursuant to CAFTA-DR Article 10.16.2. TCW made this Notice of Intent more than eight months before serving this Statement of Claim, thus satisfying CAFTA-DR Article 10.16.2. On June 27, 2007, TCW submitted a further letter in response to a letter dated June 5, 2007 from the Republic's counsel detailing TCW's fulfillment of all obligations under CAFTA-DR Article 10.16.2. These letters, particularly in combination with the many written communications and in-person meetings with the Republic, have clearly fulfilled all obligations under CAFTA-DR Article 10.16.2.

**C. Claimant's Waiver of Rights**

24. Pursuant to CAFTA-DR Articles 10.18.2 and 10.16.1(a), TCW hereby consents to arbitration and waives TCW's right to initiate or continue before any administrative tribunal or court under the law of any Party, or under any other dispute settlement procedure available to Claimant, any proceeding with respect to any measure that constitutes a violation of Chapter 10 of CAFTA-DR. TCW expressly reserves the right, consistent with CAFTA-DR Article 10.18.3, to initiate or continue any action "that seeks interim injunctive relief and does not involve payment of monetary damages before a judicial or administrative tribunal of the respondent...."

**D. Appointment of the Tribunal**

25. Article 10.19.1 of CAFTA-DR states:

**Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.**

26. Article 3(g) of the UNCITRAL Arbitration Rules requires that Claimant propose a number of arbitrators if the parties have not previously agreed thereon.
27. In accordance with Article 10.19.1 of CAFTA-DR and Article 3(g) of the UNCITRAL Arbitration Rules, the Claimant proposes that this dispute be resolved by three (3) arbitrators.
28. Article 10.16.6(a) of CAFTA-DR states in relevant part that "the claimant shall provide with the notice of arbitration [] the name of the arbitrator that the claimant appoints."
29. Pursuant to Article 10.16.6(a) of CAFTA-DR, TCW appoints Professor Thomas Wälde, the Jean-Monnet Chair, Centre for Energy, Petroleum and Mineral Law and Policy

University of Dundee and an arbitrator-barrister at Essex Court Chambers (in London, England), as its party-appointed arbitrator. His address is 3 Beley Bridge, Dunino by St. Andrews, KY16 8LX, Scotland, United Kingdom.

**E. The Applicable Law**

30. Article 10.22 of CAFTA-DR provides in relevant part:

**Governing Law**

**1. Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.**

**2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply:**

**(a) the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree; or**

**(b) if the rules of law have not been specified or otherwise agreed:**

**(i) the law of the respondent, including its rules on the conflict of laws; and**

**(ii) such rules of international law as may be applicable.**

31. Article 33 of the UNCITRAL Arbitration Rules likewise provides in relevant part that “[t]he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.”

32. Pursuant to Article 10.22 of CAFTA-DR and Article 33 of the UNCITRAL Arbitration Rules, the law governing this dispute consists of the provisions of CAFTA-DR, the principles of international law agreed upon and designated by the Republic and the

United States and other Contracting Parties to CAFTA-DR, as well as other applicable principles of international law.

**F. The Language of the Arbitration**

33. Article 17 of the UNCITRAL Arbitration Rules provides in relevant part:

**Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.**

...

34. Pursuant to Article 17, Claimant requests that the Republic agree that the language of the arbitration shall be English.

35. If the Republic does not agree that the language of the Arbitration shall be English, Claimant requests that the arbitral tribunal issue an order designating that the primary language of the Arbitration shall be English because (a) the working language of the negotiations for the investment in DREH and EDE Este was English, (b) English is the most common language for international business and for international arbitration such as this one, (c) many of the documents are in English, (d) many of the witnesses speak English, and (e) an English-language arbitration will not prejudice the Republic.

**V. RELEVANT FACTS**

**A. The Republic's Representations and Promises to Foreign Investors and the Regulatory Structure Established to Encourage Foreign Investment in the Electricity Sector**

36. The failure of the electricity sector ranks among the largest obstacles to a stable and predictable investment environment in the Dominican Republic, and — as the Republic

has agreed<sup>8</sup> — has caused “staggering” economic and social costs.<sup>9</sup> In the mid-1990s, the Republic purportedly undertook a campaign to reform the sector, including legal and regulatory changes to encourage foreign investment. Such reforms were allegedly designed to modernize the electricity sector and strengthen the rule of law. However, the Republic has continued to both issue and then renounce its representations and promises to foreign investors, including the Claimant.

37. Beginning in 1997, the Republic initiated a process of privatizing certain state-owned enterprises. This process included representations and promises to foreign investors to entice and encourage them to invest in the Republic. These representations and promises were made by and with the approval of the Republic and could only be delivered by the Republic. Indeed, the Superintendent of Electricity, Francisco Mendez, recently acknowledged the Republic’s continuing responsibility for actions concerning the electricity sector when he observed that “the [present] government has to bear the

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<sup>8</sup> See Dominican Republic Country Economic Memorandum: The Foundations of Growth and Competitiveness, Document of the World Bank, September 2006, at 136, para. 261 (the “2006 World Bank Memorandum”). The 2006 World Bank Memorandum was produced jointly by the World Bank Caribbean Country Management Unit (Latin America and the Caribbean Region) and the Government of the Dominican Republic, and expressly endorsed by the Government of the Dominican Republic. See *id.* at i-ii.

<sup>9</sup> See 2006 World Bank Memorandum at 136, para. 261. The World Bank’s 2005 Investment Climate Survey reveals that surveyed firms list “electricity” as the leading obstacle to investment in the Dominican Republic (81%), followed by “corruption” (72%) and “crime, theft and disorder” (63%). *Id.* at xvi. Furthermore, “[t]he fact that four-fifths of firms cite electricity as a major obstacle – and half of firms cite it as the greatest obstacle – implies that the electricity crisis has had an enormous impact on the economy,” and “...the ongoing electricity crisis is by far the largest impediment to investment...” *Id.* at xviii and at 120, para. 235.

problems of the electricity sector because the state has legal continuity...” and admitted that the current administration bears responsibility for the Republic’s past actions.<sup>10</sup>

38. From 1997 to 1999, the Republic reformed and privatized CDE’s generation and distribution assets. During this time, the Republic established a comprehensive set of laws and regulations further designed to cause potential investors to invest in the electricity sector of the Republic and to rely on the regulatory framework that the Republic created.

a. On June 24, 1997, the Republic enacted Law 141-97, which was designed to reform state-owned enterprises (the “Reform Law”). The Reform Law contemplated the “capitalization” of CDE, among other government-owned companies, and created the Comisión de Reforma de la Empresa Pública (“CREP”), an agency controlled by the executive branch of the Republic, to conduct the “capitalization” process.<sup>11</sup> The “capitalization” process partially privatized the Republic’s state-owned electricity generation and distribution companies by attracting foreign investment and then forming ventures owned

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<sup>10</sup> “Al Estado no le interesa comprar empresa EDE Este,” *El Día*, 3 December 2007. See Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, January 14, 2005, at 3, para. 2 (“The new government is well-aware of the need for a strong and coherent program to allow the Dominican Republic to entrench the nascent stability and establish the conditions for sustaining growth over the medium-term. To this end, it is determined to implement a new program which aims at restoring fiscal discipline and financial stability, with a strong institutional component that addresses a wide range of governance and transparency concerns. The key elements of the new program [include] [a] plan to improve the efficiency of the electricity sector to ensure its financial viability.”) (the “Letter of Intent to the IMF (January 2005)”).

<sup>11</sup> The CREP reports to the President of the Dominican Republic. See Article 2, Reform Law of June 24, 1997.

jointly by the Republic and the respective foreign investors.<sup>12</sup> Pursuant to Article 2 of the Reform Law, the CREP had authority over CDE and other companies with respect to the reforms.

- b. On March 16, 1998, the Republic issued Presidential Decree No. 118-98, which created the SIE as a division of the Ministry of Industry and Commerce. The Republic charged the SIE with the responsibility of formulating policies to govern the Republic's electricity sector.
- c. Pursuant to Presidential Decree No. 464-98, the President of the Republic and the board of directors of the CDE authorized the General Manager of the CDE to execute all agreements on behalf of the CDE in order to complete the capitalization process and achieve the goals of the Republic.

39. To encourage foreign investors to make investments in the Republic's electricity sector, the Republic made numerous representations and promises regarding the "modern regulatory framework" that it had created and the guarantees established pursuant to that framework. These representations and promises were designed to create an "attractive legal framework for foreign investment in the Dominican Republic."<sup>13</sup>
40. On February 25, 1998, the CREP issued "Circular No. 2," which was entitled "Process of Capitalization of the CDE: Pre-Qualification of Bidders," and which promised a

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<sup>12</sup> The Reform Law reflected the "unprecedented recognition of the need to re-engineer CDE and the Government's participation in certain key industrial sectors." See Information Memorandum at 136.

<sup>13</sup> See Information Memorandum at 16. The Republic's Legal and Regulatory Framework included a new Foreign Investment Law that was designed, among other things, "to grant 'equal treatment' to the foreign investor vis-à-vis the domestic investor." *Id.* at 122.

“regulatory framework, which will be known by the pre-qualified bidders, [and] will be the guarantee of the investments in the sector.”<sup>14</sup>

41. In May 1998, the CDE, on behalf of the Republic, issued the Information Memorandum to parties who had pre-qualified to participate in the second phase of the bid process. The Information Memorandum made numerous representations regarding the “Regulatory Framework that shall regulate the power market of the Dominican Republic”<sup>15</sup> that was designed to invite investors to capitalize the Republic’s electricity sector. For example:

***The Dominican Government has embarked on a bold initiative to restructure the entire electricity sector . . . The primary goals of the new structure are to create a competitive market in generation, create a rational regulatory framework for distribution, and provide capital needed for needed improvements to the system.***

Information Memorandum at 2 & 5 (emphasis added). The Republic also declared that the purpose the tariff setting process was to “provide a simplified regulatory scheme and tariff setting process *which limits the discretionary role of the Government through the establishment of objective criteria for setting prices* in a manner which results in an economically efficient allocation of resources within the electricity sector.” *See id.* at 7 (emphasis added).

42. In the Information Memorandum, the Republic specifically declared that the applicable tariffs would “*be calculated in accordance with the regulatory framework.*”<sup>16</sup> The

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<sup>14</sup> *See also id.*, Question 11, Answer 11 (“The planned regulatory framework will establish the tariff policy of the sector, and its basic principles will establish regulated prices for the users of public service (distribution and transmission) and the market prices for generation.”)

<sup>15</sup> *Id.* at 126.

<sup>16</sup> *Id.* at 20 (emphasis added).

Republic provided investors with specific details regarding the tariff structure established by the legal and regulatory framework:

**The current tariff structure is based on the internal regulations of CDE (a copy of these regulations will be in the Data Room) and it contains the different types of tariffs, consumption charges and adjustment formulas. *This structure will remain effective for the next four years.***<sup>17</sup>

...

**The tariff structure will be based on the Chilean model *and will permit the pass-through of the average energy purchasing price plus the distribution added value for distribution's cost component.***<sup>18</sup>

43. The Republic has repeatedly represented that it would enforce the laws and regulations necessary to reduce the level of theft in the country. For example, in the Information Memorandum, the Republic stated “[r]egulation is in place to ensure that the distribution companies will be able to collect unpaid invoices”<sup>19</sup> and that institutions would enforce the legal and regulatory framework that the Republic established:

**The Superintendency [SIE] will have, among others, the following functions:**

- **Supervising compliance with statutory, regulatory, and technical provisions relating to the generating, transmission, distribution and marketing of power.**

...

- ***Enforcing the system of penalties established under the regulations for implementation of statutes.***<sup>20</sup>

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<sup>17</sup> See *id.* at 74 (emphasis added). The Information Memorandum specified four components of the current tariff structure: a fixed charge, an energy charge, a fuel adjustment, and an exchange rate adjustment. *Id.* at 75.

<sup>18</sup> *Id.* at 20.

<sup>19</sup> *Id.* at 67 (emphasis added).

<sup>20</sup> *Id.* at 10 and 127 (emphasis added).

...

**Cut-Off and Reinstallation of Service. Resolution No. 45 adopted by the Ministry for Industry and Commerce on March 18, 1998 contains the following provisions relating to the cut-off and reconnecting of electrical power service:**

- **The beneficiaries of electrical project operating rights may cut off a user's service or supply immediately, on such terms and grounds as may be established under the electrical power service contracts.**

...

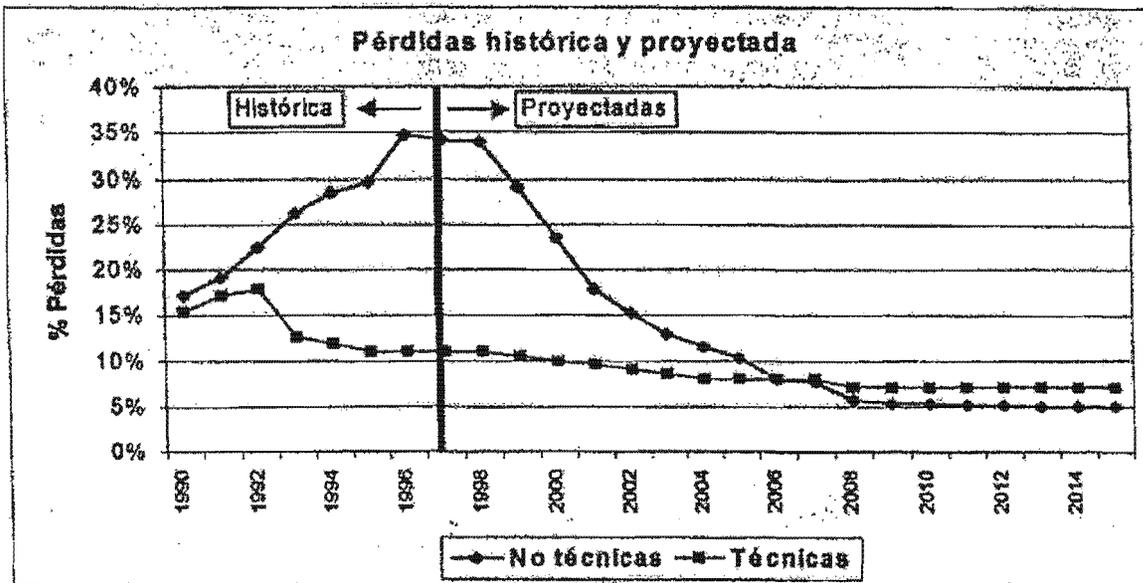
- **The beneficiaries of electrical project operating rights shall apply such cut-off and reconnection charges as may have been set in advance by the Superintendency and indicated in the grant of rights contract to operate electrical power projects.<sup>21</sup>**

44. In its representations to investors, the Republic also repeatedly projected that by today, non-technical losses would fall to a small fraction of their historically high levels. For example, in the CREP's Final Report entitled "Actualización de la Proyección de la Demanda del Mercado Eléctrico Servido Principalmente por la Corporación Dominicana de Electricidad," conducted by Estudios Técnicos Económicos de Energía and dated September 1998, the Republic projected the following level of technical and non-technical losses from 1999 to 2015:

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<sup>21</sup> *Id.* at 71.

Año	% Pérdidas no Técnicas	% Pérdidas Técnicas
1988	34	11.0
1999	32	10.5
2000	24	10.0
2001	20	9.5
2002	16	9.0
2003	14	8.5
2004	12	8.0
2005	10	8.0
2006	8	8.0
2007	6	8.0
2008	6	7.0
2009	6	7.0
2010	6	7.0
2011	6	7.0
2012	6	7.0
2013	6	7.0
2014	6	7.0
2015	6	7.0



at 43-44.

45. In October 1998, the Republic formally promulgated a series of resolutions (the “1998 Tariff Resolutions”) that created the regulatory structure for the electricity sector for the private investors that participated in the capitalization of the formerly state-owned entities. This series of resolutions specified electricity pricing tariffs, and guaranteed two four-year periods of pricing tariffs that could only be modified in certain limited circumstances. The first four-year phase, from 1999 to 2002, consisted of the same tariff regime that had previously applied to the state-owned electricity distribution company. In the second four-year phase, from 2003 to 2006, a tariff that utilized a complete pass-through cost method was to be implemented. Moreover, the Republic intended the complete pass-through cost method to become permanent, consistent with the central goals of the capitalization reform.<sup>22</sup>

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<sup>22</sup> See the 2006 World Bank Memorandum at xix, para. 51 (noting that the “restructuring efforts of 1997-2002” are part of reform efforts designed to create “long-term financial sustainability of the electricity sector[.]”). Moreover, in communications with the International Monetary Fund (the “IMF”) from 2003 through 2007, the Republic repeatedly and unequivocally expressed its commitment to the goals of the 1998-2002 reform effort. See, e.g., Letter of Intent, Memorandum of Economic Policies, and Technical Memorandum of Understanding, August 5, 2003 at 8, para. 16 (“A key objective of the government is to improve efficiency and finances of the electricity sector. . . . To place the sector on viable footing, we aim to increase the price of electricity gradually by 3 percent per month to the level needed to meet costs. . . . Until the tariff structure has been rationalized, fiscal subsidies will be transferred to the distribution companies to compensate them for the losses that result from the compression of tariffs. . . .”) (the “Letter of Intent to the IMF (August 2003)”); Letter of Intent, Supplemental Memorandum of Economic Policies, and Technical Memorandum of Understanding, January 23, 2004 at 6, para. 10 (“We intend to prepare by September 2004 a comprehensive electricity sector reform to be agreed with the World Bank . . . This reform will aim at sharply improving cash recovery by the electricity distribution companies and putting in place a more efficient functioning of the system. . . .”) (the “Letter of Intent to the IMF (January 2004)”); Letter of Intent to the IMF (January 2005) at 16, para. 37 (“By February 2005, tariff regulations will ensure that fluctuations in the exchange rate and crude oil prices will be passed-through automatically to the final consumer tariffs, with a lag of only one month.”); Letter of Intent and Technical Memorandum of Understanding, September 29, 2005 at 8, para. 23 (“The government remains committed to taking all necessary steps to minimize slippages in budgetary aid to the energy sector programmed for 2005 and to

(continued...)

- a. Resolution 235-98 of October 29, 1998 (“Resolution 235-98”) set forth the overall regulatory framework for the operation of the electricity sector in the Republic, which was intended to be permanent. Among other things, Resolution 235-98 established that the capitalized electricity distribution companies possessed the right to establish their own tariffs so long as they informed the SIE about the adjustments made under the indexation formula.
- b. Resolution 236-98 of October 29, 1998 (“Resolution 236-98”) established technical regulations for the operation of the electricity sub-sectors as set forth in Resolution 235-98, and established the rules for governing agents involved in electricity projects.
- c. Resolution 237-98 of October 30, 1998 (“Resolution 237-98”) set forth the tariffs applicable for electricity distribution. Specifically, Resolution 237-98:
  - i. established the rate options, conditions, and formulas that described how the electricity tariffs for the distribution companies would be set until December 31, 2006 (Article 1);
  - ii. set forth and guaranteed a specific formula for 1999 to 2002 for calculating the rates to be charged by distribution companies to the final customers, including the means of indexation, and authorized the distribution companies to adjust rates automatically if the variable components of the specific formula changed (Article 3) (the “**First-Phase Tariff**”); and

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(...continued)

rehabilitate the sector’s financial position.”) (the “Letter of Intent to the IMF (September 2005)”).

- iii. set forth and guaranteed a tariff regime from 2003 to 2006 that recognized and passed through to consumers *all* the actual costs of electricity distributors, which would have resulted in a reasonable rate of return on the invested capital (Article 4.5) (the “**Second-Phase Tariff**”).
46. The 1998 Tariff Resolutions were designed to protect EDE Este and the other distributors from fluctuations in the cost of distributing electricity in the Republic. Because all fuel is imported into the Republic and the Dominican Peso fluctuates against the U.S. Dollar, the electricity sector has always been sensitive to U.S.-dollar-based commodity prices. The tariff structure established by the Republic in Resolutions 235-98, 236-98 and 237-98 guaranteed that in the event of a devaluation of the Peso, any increase in fuel costs would be passed along to customers.
47. The bidding materials that CREP distributed to international bidders contained, among other things, a copy of the 1998 Tariff Resolutions, which were the series of resolutions set forth above that the Republic enacted in October 1998.
48. On October 31, 1998, the CREP represented and promised to the potential foreign investors that Resolution 237-98 “*constitutes the tariff specification that will govern in the Republic during the period January 1999 — December 2006.*” (emphasis added).<sup>23</sup>
49. Moreover, the Republic has consistently represented that the purpose of the tariff structure was to facilitate a permanent reform in the sector, and that failure to implement

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<sup>23</sup> See CREP, Circular No. 19, Process of Capitalization of the CDE, REF: CREP/CDE/01-98 Phase II – Adjudication, 31 October 1998; “Isa Conde asegura que la capitalización de la CDE no subirá la tarifa eléctrica,” Listín Diario, 7 August 1998 (Director of CREP (Conde) declared that the state will maintain the regulation of the energy sector and accordingly the Secretary of Industry and Commerce through the Superintendent of Energy has fixed a tariff system for eight years).

a complete pass-through of costs is “temporary.”<sup>24</sup> Achieving a complete pass-through of costs has repeatedly been represented as a central feature of the new framework.

50. During the capitalization process, the Republic recognized the problems caused by electricity theft and the necessity for enforcement of the law to effectively manage the electricity sector.<sup>25</sup> Likewise, representatives of the Republic have made numerous public statements regarding the necessity for and importance of preventing the theft of electricity<sup>26</sup> as well as the problems created due to the Republic’s failure to apply the “rules of the game” that the Republic approved and implemented.<sup>27</sup>

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<sup>24</sup> See, e.g., Letter of Intent and Annex to the Technical Memorandum of Understanding, April 24, 2006 at 7, para. 19 (“While we intend for the electricity tariff to fluctuate with oil prices and the exchange rate (in accordance with the regulation published by the Superintendency of Electricity), if the tariff is *temporarily* below the calculated tariff, the resulting higher transfers to the electricity sector will be offset by lower spending in non-priority areas.”) (the “Letter of Intent (April 2006)”) (emphasis added); Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, January 31, 2007 at 6,7, para. 11 (Reaffirming commitment to reform in the electricity sector, and noting that “[w]e intend, in principle, to allow electricity prices to fluctuate in line with international oil prices and the exchange rate (according to a resolution from the Superintendency of Electricity). However, in the case that electricity prices are *temporarily* lower than the reference prices, we will cover any additional transfers to the electricity sector....”) (emphasis added) (the “Letter of Intent to the IMF (January 2007)”). The Republic also recognizes the “implement[ation] [of the] tariff indexation formula” as a “policy recommendation” in the 2006 World Bank Memorandum at xxvi.

<sup>25</sup> See Information Memorandum at 69 (“Power losses in the Dominican Republic’s electrical power system are the sector’s principal operating problem. The high level of losses during the past decade has been due mainly to non-technical losses, the principal problems of which are illegal user connections, defective meters and discrepancies between readings and billing and collection for power supplied . . . The level of technical losses is quite high compared to international standards . . . The rising level of non-technical losses gives rise to a serious financial imbalance within CDE which adversely affects the quality and supply situation.”); “La capitalización de la CDE se ve empañada por la situación de la empresa,” Listín Diario, 12 Apr 1999 (study from ONAPLAN (Office of National Planning) establishes that the principal problem of the CDE is losses, both technical and because of the failure to collect on the service provided).

<sup>26</sup> See “Reitera capitalización no lesionará patrimonio cultural,” El Nuevo Diario, 9 December 1998 (Rhadames Segura stated that customers that have not been able to pay their  
(continued...)

51. Despite the Republic's rhetoric about improving enforcement, theft in the electricity sector has not been curtailed or deterred, and it continues — on a daily and going-forward basis — to create losses to EDE Este and the Claimant.<sup>28</sup>
52. The Republic consistently has promised measures to curtail the theft and then reneged. Distributors, such as the Claimant, who have relied upon and continue to rely on such promises, continue to suffer the consequences of the Republic's actions as well as its failure to act.<sup>29</sup>

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(...continued)

debts will have to figure out a way to do it and many people have figured out a way to pay. The CDE will apply methods so that all debtors understand the promise they made with the company and the country. Segura also stated that all the world has to pay for electricity, including the state institutions, now that energy is expensive and cannot be given away); "Privatización CDE va en junio como sea," Ultima Hora, 30 January 1998 (Temistocles Montas stated that "Before the problem was because people weren't invoiced, now the problem is that they don't pay.").

<sup>27</sup> See "The Dominican Government admits weak legal security," Dominican Today, 23 February 2007 ("Many of the problems that we have been confronting have to do with the lack of application of the rules of the game that are approved," he said, adding that when those firms come to the country under a certain context, 'they are modified soon after.'" (quoting Temistocles Montás).

<sup>28</sup> The 2005 World Bank Investment Survey reveals that 34% of total electricity consumption was not paid for, and the cash recovery index ("CRI") for EDE Este in 2004 was 51%. See 2006 World Bank Memorandum at 143, paras. 273-74. Moreover, "electricity theft through illegal connections [...] and low bill collection rates" are a main factor of the prolonged electricity crisis. *Id.* at 133. The Republic recognized as recently as September 2007 that it has failed to remedy the problem of theft in the electricity sector. See Electricity Sector Monitoring Quarterly Report, September 2007, at 35, Annex 4, "Overview of Electricity Sector" ("[a]n extremely high level of non-payment by electricity customers and theft of electricity exists. The combined level of non-payment and theft is higher than any other comparable country in the Caribbean and is among the highest in the world. The Distribution Companies do not recover sufficient revenue to cover their costs of power purchases from generators and their internal operating costs.").

<sup>29</sup> See 2006 World Bank Memorandum at xviii, para. 46 ("Weak institutional capacity and oversight are the chief culprits behind the [electricity] crisis, providing another example of the high costs of weak governance. The sector's convoluted path from poor-performing public utilities to privatization to implicit subsidies and then re-nationalization did not resolve issues of poor service quality, which continue to be exacerbated by *illegal connections and non-payment*, all at a persistent exorbitant cost to the government and consumers. *The lack of transparency*,  
(continued...)

**B. The Creation of EDE Este and its Relationship with the Republic**

53. The purpose of the Republic's promulgation of the laws, resolutions and entities described above was to establish a predictable regulatory system to attract the funds needed for the capitalization of the Republic's electricity system by foreign investors in 1999 and to maintain a stable framework for the electricity sector's viability.
54. Pursuant to the Reform Law and following the directives issued by CREP, the CDE formed five different subsidiaries. The CDE then proceeded to transfer all of its thermoelectric generation assets to two of these subsidiaries, the Empresa Generadora de Electricidad Itabo, S.A. ("Itabo") and the Empresa Generadora de Electricidad de Haina, S.A. ("Haina"). CDE transferred all of its distribution assets to three distribution companies: (i) EDE Este; (ii) Empresa Distribuidora de Electricidad del Norte, S.A. ("EDE Norte"); and (iii) Empresa Distribuidora de Electricidad del Sur, S.A. ("EDE Sur"). All hydroelectric generation and transmission assets remained with CDE.
55. The Republic invited foreign private companies to participate in the privatization by contributing financial capital to the new electricity distribution companies. In exchange for their investment, the private investors would receive 50% of the outstanding common stock of each company.<sup>30</sup> The Republic referred to this process as "capitalization."

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(...continued)

*public accountability, and a broader political consensus on reform decisions and inadequate political will to push for a resolution have delayed or blocked reform.*" (emphasis added).

<sup>30</sup> The other 50% of the shares "belong to the Republic." See CREP "Proceso de Capitalización de la CDE, REF: CREP/CDE/01-98 Fase II-Adjudicación," Circular No. 8, Question No. 7.

56. CREP was put in charge of soliciting international bids. The Republic created the CREP to institutionalize the public policy of the Republic of allowing private enterprises to rehabilitate the electric energy infrastructure and other government-owned enterprises. *See, e.g.*, Share Subscription Agreement at 1 (whereas A clause), discussed below. The private investors that invested in the electricity industry were to be given management control over the newly-formed electricity companies through special provisions in the companies' bylaws and through the execution of management agreements between each of the subsidiaries and the individual foreign investors. *See, e.g.*, Share Subscription Agreement Articles 2-7.

**C. The Republic's Agreements with EDE Este and DREH**

57. On April 15, 1999, CREP announced that AES, the parent of DREH (then named AES Distribución) was one of the winners of the public international bid for the selection of the private investors and was granted the right to invest in EDE Este. DREH initially invested US\$109.3 million in EDE Este. As set forth below, this capitalization process included the execution of four interrelated agreements (collectively the "Basic Contracts"), which stipulated that the Basic Contracts would be complemented by, and would be in accordance with, the regulatory framework that the Republic promulgated in 1998.<sup>31</sup>

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<sup>31</sup> *See, e.g.*, Information Memorandum at 126 ("The legal ability of the new capitalized generating and distributing companies to develop their activities in the Dominican Republic, will be established through a grant of rights contract between CDE and each company. These contracts will incorporate the agreements between the parties and their obligations, thus constituting part of the Legal Framework in reference to each of the Capitalized Companies.")

58. The Basic Contracts are:
- a. the Share Subscription Agreement, which was executed on July 13, 1999 between CDE and DREH (then named AES Distribución) (the “Share Subscription Agreement”), and which transferred 50% of the ownership of EDE Este to DREH;
  - b. the Concession Agreement, which was executed on August 5, 1999 between CDE and EDE Este (the “Concession Agreement”), and which granted EDE Este the exclusive right to construct and operate the electricity distribution system in the eastern portion of the island;
  - c. the Energy Sales Agreement, which was executed on August 5, 1999 between CDE and EDE Este (the “Energy Sales Agreement”), and which provided for the sale of electricity by CDE (and later, other generators) to EDE Este; and
  - d. the Management Agreement, which was executed on August 5, 1999 between EDE Este and DREH (then named AES Distribución) (the “Management Agreement”).
59. The Basic Contracts reflected the fulfillment of the Republic’s stated public policy to capitalize the electricity sector by forming joint ventures with foreign investors, to establish a new long-term structure for the electricity sector, and to guarantee certain rights to EDE Este. DREH relied on the long-term regulatory structure and the commitments made by the Republic when making its investment in EDE Este in 1999. The Republic has renewed publicly its commitment to these reforms, and TCW relied on the Republic’s repeated affirmations when investing in the sector in November 2004.

1. **The Share Subscription Agreement**

60. On July 13, 1999, the CDE and AES Distribución (as DREH was then named) executed the Share Subscription Agreement. In the Share Subscription Agreement, the Republic declared that, through the CREP, it intended to:

**as a matter of policy . . . involve the private sector in the restructuring and operation of the infrastructure of electric power generation and electricity distribution . . . permitting new private sector capital to rehabilitate and extend the generation and distribution system, which creates a competitive electricity market that awards efficiency and good management.**

Share Subscription Agreement at 1.

61. In the Share Subscription Agreement, the Republic agreed to establish EDE Este and transfer to it certain electricity distribution assets, including operating licenses, and certain liabilities. In return, EDE Este was to issue to the CDE its Class A common shares, which constituted 50% of the ownership of EDE Este. *See* Share Subscription Agreement at 3 & Article 2.

62. The Share Subscription Agreement provided that EDE Este would transfer its Class B common shares, which constituted 50% of the ownership of EDE Este, to DREH. *See* Share Subscription Agreement Articles 2.2 & 2.3. In addition, the parties agreed that they would sign an agreement that granted DREH management control of EDE Este. *See* Share Subscription Agreement Articles 2.1(a), 3.2(b)(viii), 5.1(a).

63. DREH was fully aware of the contents of the Basic Contracts on the date of the bid, and its decision to make its bid and subsequently enter into the Share Subscription Agreement and the Concession Agreement was premised upon its understanding that upon its investment in EDE Este these agreements would be executed. The Share Subscription Agreement and the Concession Agreement treat the Basic Contracts as a single group of

documents. *See* Concession Agreement Article 1 and Share Subscription Agreement Article 1.1.

64. Articles 5.1, 7.4 and 7.6 of the Share Subscription Agreement incorporated into the Share Subscription Agreement the representations made to EDE Este under the Concession Agreement. The Share Subscription Agreement thus bound CDE to all the obligations listed in the Concession Agreement so that a violation of the Concession Agreement constitutes a violation of the Share Subscription Agreement, and vice-versa.
65. Article 2.4, paragraph 1 of the Share Subscription Agreement provides that CDE and DREH shall approve all increases of capital necessary to carry out EDE Este's business, including increases of capital needed to comply with minimum quality requirements set forth by the regulator. These increases were to be made pursuant to the bylaws, and the parties were prohibited by this provision from unreasonably opposing any increase.

## **2. The Concession Agreement**

66. On August 5, 1999, less than one month after CDE and DREH executed the Share Subscription Agreement, CDE and the newly-created EDE Este executed the Concession Agreement. The Concession Agreement granted EDE Este the exclusive right to construct and operate the electricity distribution system to consumers in the eastern portion of the island for no less than 40 years and to receive the income generated from that distribution. *See* Concession Agreement Articles 2 & 3.
67. The Concession Agreement incorporates the laws and regulations of the Republic as they existed at the time of the execution of the Concession Agreement into the agreement itself.

- a. Item F of the “Whereas” clauses provides that the Concession Agreement was executed “in conformity with Resolution 235-98” and grants the electric companies the right to “build and operate electric power works, under the conditions set forth in the contract and in conformity with this resolution *and other legal provisions in force.*” (emphasis added)
- b. Article 4 of the Concession Agreement grants certain rights to EDE Este, which include but are not limited to the rights to:
  - a) **Have access, to use and occupy the assets of the State, of the Municipality, and of public and private ownership in accordance with the applicable laws, necessary for the operation of its facilities, and to supply the public service of distribution, in particular, those included in Annex 4, under the conditions established thereby. . .**
  - ...
  - d) *Receive the other benefits that are granted by the laws of the Dominican Republic that regulate the electric sub-sector* (emphasis added);
  - e) **Be exclusive distributor of the users subject to price regulation, within its Territory for the distribution of electricity. . . .**

68. Significantly, Article 13 of the Concession Agreement contains a “stabilization clause.”

Article 13 states:

*This Agreement has the force of law between the parties and, by virtue of Article 47 of the Constitution of the Dominican Republic, it shall not be affected by any new law, regulation or administrative provision, and may only be altered by written agreement between the parties.*

(emphasis added)

69. Thus, pursuant to the Concession Agreement, EDE Este was entitled not only to the rights set forth in the Concession Agreement itself, but also to all the benefits and

protections of Dominican law — including the rights granted to it under the Dominican Constitution and the 1998 Tariff Resolutions — at the time that the Concession Agreement was executed.

### **3. The Energy Sales Agreement**

70. On August 5, 1999, CDE signed the Energy Sales Agreement with EDE Este. Under the Energy Sales Agreement, EDE Este agreed to purchase electricity from CDE and subsequently, the capitalized generators, at certain prices for specified periods of time. The Energy Sales Agreement was a long-term contract based upon, and executed in consideration of, the energy costs that the Republic recognized and accounted for in the indexation formulas contained in Resolution 237-98. DREH relied upon the indexation formulas established in Resolution 237-98 when EDE Este signed the Energy Sales Agreement.

### **4. The Management Agreement**

71. On August 5, 1999, EDE Este signed the Management Agreement with DREH. The Management Agreement was signed pursuant to Article 14 of the Reform Law, which required the respective investors in the electricity distribution companies to sign a management contract for the management of the distribution companies once they were capitalized. Under the Management Agreement, DREH agreed to assume the responsibility for managing EDE Este from the Republic.

**VI. THE REPUBLIC'S CONTINUING FAILURE TO FULFILL ITS PROMISES IN THE ELECTRICITY SECTOR**

**A. The Republic's Repudiation of Its Representations to, and Agreements With, EDE Este**

72. Pursuant to the Basic Contracts and 1998 Tariff Resolutions, the Republic guaranteed certain rights to EDE Este and to DREH when it invested in and capitalized EDE Este, and the Republic has repeatedly ratified and promised to honor those rights over the life of the Claimant's investment.<sup>32</sup>
73. After the execution of the Basic Contracts and the capitalization of EDE Este, however, the Republic made numerous fundamental unilateral modifications to the Basic Contracts and the legal and regulatory framework that the Republic had guaranteed at the time that DREH had capitalized EDE Este. These fundamental unilateral modifications to the Basic Contracts continue to damage the Claimant and its investment, EDE Este, on a daily and ongoing basis.
74. The Republic's continuing course of wrongful conduct vis-à-vis EDE Este has deprived the Claimant of rights it relied upon in acquiring EDE Este. These ongoing unilateral modifications of the Basic Contracts and the regulatory framework, as well as repeated failure to compensate for or reform past failures to implement the promised legal and regulatory scheme, have resulted in catastrophic losses for EDE Este, the Claimant, DREH, and electricity consumers in the Republic.

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<sup>32</sup> See, e.g., 2006 World Bank Memorandum at 145, para. 281 (reaffirming commitment to cover the difference between indexed and actual tariffs) and at 148, para. 294 (reaffirming restructuring efforts of 1997-2002); Letter of Intent to IMF (April 2006) at 7, para. 19, and the Letter of Intent to IMF (January 2007) at 7 (stating that deviations from a tariff structure that achieves a complete pass-through of costs is merely "temporary").

**1. The Republic's Failure to Indemnify EDE Este For Its Refusal to Implement the First-Phase and Second-Phase Tariffs**

75. On March 31, 2003, and on numerous occasions thereafter, the Republic promised to indemnify EDE Este for losses resulting from the Republic's failure to implement the 1998 Tariff Resolutions. However, the Republic's indemnification payments, which continue through the present — and which will go on until a pass-through cost structure is put in place — have instead resulted in a growing debt for EDE Este. The Republic has quietly and improperly insisted that EDE Este treat the indemnification payments as loans or other accounts receivable (including but not limited to offsets and debt), giving the Republic an increasing, incremental, and wrongful interest in EDE Este. Thus, the Republic's conduct has incrementally resulted not in the promised achievement of a permanent, complete pass-through of costs, but instead in an accumulation of debt that EDE Este bears as the cost of relying on the Republic's representations. The Republic has thereby intentionally and wrongfully created a mechanism through which it, as creditor of EDE Este, may force EDE Este into liquidation and acquire the equity of EDE Este, and further implement its scheme to regain control of the Claimant's investment through this growing imposition of debt.
76. The Republic never implemented the First-Phase and Second-Phase Tariff Phases as promised. As set forth above, the 1998 Tariff Resolutions established a certain level of tariffs that EDE Este would be able to charge for the first and second four-year periods following capitalization (the First-Phase and Second-Phase Tariffs), beginning in 1999 and extending through 2006.<sup>33</sup> However, as set forth in more detail below, shortly after

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<sup>33</sup> See "Isa Conde asegura que la capitalización de la CDE no subirá la tarifa eléctrica," Listín Diario, 7 August 1998 (Antonio Isa Conde, the Director of the CREP, stated that the  
(continued...)

EDE Este was capitalized, the Republic began a course of conduct that prevented EDE Este from charging consumers the tariffs expressly promised under the 1998 Tariff Resolutions, the Concession Agreement, and the Subscription Agreement.

77. The First-Phase Tariffs were to create the same tariff regime that had previously applied to the state-owned electricity distribution company, including a guaranteed specific formula for calculating the rates and authorization of the distribution companies to adjust rates automatically if the variable components of the specific formula changed.
78. The Second-Phase Tariffs were to create a full pass-through of all costs that distributors incur in connection with the distribution of electricity, including energy costs, transmission costs, generation costs, distribution added value, capital expenditures, operation and maintenance, and other appropriate costs. The Second-Phase Tariffs were also structured to allow the distribution companies to finance necessary investments and receive a reasonable rate of return. Furthermore, the Republic intended the pass-through cost method to become permanent, consistent with the goals of the capitalization reform.
79. Notwithstanding the 1998 Tariff Resolutions established by the Republic and relied upon by investors, the Republic subsequently flouted its representations and promises and overrode the First and Second Tariff Phases. For example, on July 26, 2001, the Legislature of the Republic enacted General Law of Electricity 125-01 ("Law 125"). Law 125 abrogated the regulatory regime enacted in the late 1990s by empowering the SIE to unilaterally set the tariffs, tolls, and indexation formulas, which effectively deprived EDE Este of its ability to adjust its tariffs. (See Art. 139) ("This Article

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(...continued)

CREP has designed a self-sufficient electric sector that does not depend on subsidies and with the participation of mixed companies and does not depend on the central government).

expressly supersedes any other law, decree, regulation, or provision to the extent that it may be contrary to the provisions of this Law.”). Law 125:

- a. established the SIE as the regulatory body with the power to determine rates in accordance with the law (Article 24);
- b. granted power to the SIE to authorize the modifications to the electricity rate levels requested by the companies pursuant to the indexation formulas determined by the SIE (Article 24); and
- c. provided that the rates to the regulated final user can be adjusted by prior request by the distribution company to the SIE, based on an analysis of costs and pursuant to indexation formulas established by the SIE (Article 114).

80. EDE Este has repeatedly protested Law 125 and its related regulations, which were in plain violation of the 1998 Tariff Resolutions and the Basic Contracts, and, in particular, violated the stabilization clause contained in Article 13 of the Concession Agreement.

81. Despite the Republic’s repeated public recognition of its obligations under the 1998 Tariff Resolutions, these fundamental changes in the regulatory structure began in September 2002 with the enactment of SIE-31-2002 and continue through the present, and create ongoing damage to the claimant. In SIE 31-2002, which was promulgated in September 2002, the Republic announced that it would implement a “Transition Tariff” different from that previously guaranteed by the Republic. Unlike the Second-Phase Tariff, this “Transition Tariff” did not take into account EDE Este’s full costs for distributing electricity.

82. The formulas that had been set forth in the 1998 Tariff Resolutions were designed to calculate a proper market price for electricity. The Republic’s unilaterally-altered

regulatory structure established a lower, unfair price contrary to the market-based formula.

83. To compensate EDE Este for its inability to charge the tariffs expressly provided for in 1998, the Republic repeatedly has agreed to indemnify EDE Este for the difference between the new regulated price and the price at which EDE Este was entitled to distribute electricity as set forth in the 1998 Tariff Resolutions. For example:
- a. After the Republic refused to allow EDE Este to charge the full First-Phase Tariffs in 1999, the Republic made promises to EDE Este that it would indemnify EDE Este for the difference between the tariffs that EDE Este was allowed to charge and the full First-Phase Tariff.
  - b. On July 25, 2000, the Republic executed the Agreement of Payments and Retentions (“Acuerdo de Pagos y Retenciones”) with EDE Este, which provided that the Republic would indemnify EDE Este for the deficiency that had accrued from August 1999 to July 2000.
  - c. On March 31, 2003, the President of the Republic issued Presidential Decree No. 302-03. Decree No. 302-03 again formalized the Republic’s promise to indemnify EDE Este. This Decree also created a “Special Rate Stabilization Fund” (the “Stabilization Fund”), to fund the indemnity for EDE Este for the increases in the First-Phase Tariffs until the Second-Phase Tariffs were to enter into force. In late 2003, the Republic began to make partial payments to EDE Este from the Stabilization Fund that continued through 2005, but it has subsequently failed to make payments from the Stabilization Fund in a timely manner or to make them at all.

- d. On February 11, 2004, in a memorandum entitled the “Points of Framework Agreement for the Sustainability of Electric Generation in the Republic” (“Puntos de Acuerdo Marco Para La Sostenibilidad de Generación Eléctrica en La República Dominicana”), the Republic memorialized its agreement to indemnify EDE Este for its losses as a result of the Republic’s unilateral modification of the regulatory structure it established in 1998. In Article 1 of that agreement, the Republic “and its bound entities” recognized and accepted responsibility for indemnifying the private electricity distributors for the losses. Article 1 specifically recognized the goal of “regain[ing] the economic balance necessary to maintain sustainability in the National Interconnected Electric System in proportion to their participation in the same.” In the Points of Framework Agreement, the Republic agreed to indemnify the electricity companies for US\$32.5 million as a result of its failure to pay previous indemnities, and specifically promised that EDE Este would receive US\$10 million of this amount. See Section 4.
- e. In March 2005, EDE Este signed a General Sector Agreement with the Republic. This General Sector Agreement (1) stated that the accumulated debt of sector participants would be frozen until the end of 2005, (2) committed stakeholders to stay current on payment obligations arising in 2005, including interest on outstanding debt, and (3) promised a US\$350 million government indemnity to the electricity sector to fill the projected sector deficit.

84. TCW purchased EDE Este in November 2004, in reliance upon the Republic's representations and promises that it would indemnify EDE Este for its inability to apply the tariffs set forth in the 1998 Tariff Resolutions.
85. After acknowledging its failure to keep the promises set forth in the 1998 Tariff Resolutions, the Republic subsequently began to make payments to EDE Este that were purportedly intended to indemnify EDE Este for the damages caused by the Republic's failure to implement the 1998 Tariff Resolutions.
86. The Republic has publicly and consistently represented that it has paid — and will continue to pay — subsidies to electricity distributors so long as the tariff structure fails to achieve a complete pass-through of costs. For example, the Republic represented that it paid US\$550 million in subsidies to the electricity sector in 2005, and projected that it would owe US\$700 million in 2006.<sup>34</sup>
87. However, even though the Republic promised to indemnify EDE Este and continues to represent publicly that payments to EDE Este are “subsidies,” the Republic refuses to allow EDE Este to record such payments in its financial statements as revenue. Instead, the Republic has again quietly reneged on its promise to indemnify EDE Este by insisting that the payments it announces publicly as subsidies are actually loans to EDE Este or other debt that EDE Este allegedly owes to CDEEE, and which EDE Este must repay. The cumulative total of these “loans,” purported accounts receivable, and other unpaid indemnification as of December 2007 exceeds US\$500 million and grows every day. Likewise, the amount that the Republic owes EDE Este based on the Republic's promise to indemnify electricity distributors continues to grow so long as the Republic refuses to

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<sup>34</sup> See 2006 World Bank Memorandum at 137, para. 262.

implement a tariff structure that achieves a complete pass-through of costs. Furthermore, so long as the Republic continues to treat the payments to EDE Este as loans or accounts receivable — which the Republic rightfully owes as indemnification — the Republic positions itself as creditor to the Claimant's faltering investment and, thus, as the beneficiary of EDE Este's shares in the investment once the Republic's actions force a liquidation.

88. The Republic's failure to implement the First-Phase and Second-Phase Tariffs as promised, and its subsequent treatment of payments as loans or other accounts receivable (including offsetting transactions and purported debt), have denied EDE Este its rightful recovery of costs incurred in the distribution of electricity and forced EDE Este to distribute electricity below its actual cost without indemnification for those costs. So long as the Republic continues these wrongful actions, EDE Este has been, and continues to be, wrongfully denied revenue for the following costs:

- a. energy costs, including non-fuel costs such as the capacity component and fuel costs;
- b. transmission costs, including a full pass-through of transmission tolls;
- c. compensation for increased fees and taxes, including payment of 3% of all billings to municipal governments, a 1% fee imposed by the SIE and the CNE, and an additional fee required to be paid to the Coordinating Body;
- d. import duty taxes, including calculated import duties in the tariff, actual import duties paid (10%), and the advance tax;
- e. a 1.5% minimum tax retention fee;

- f. distribution added value and related costs that EDE Este incurred as a result of distribution, including but not limited to payments from unregulated users who are still connected to the electricity grid as well as unregulated users who are physically bypassing the electricity grid;
  - g. ½ cent compensation for fuel costs (authorized by Resolution No. 283-00); and
  - h. changes in costs caused by changes in foreign exchange rates.
89. Likewise, EDE Este's financial damage includes, but is not limited to
- a. cash shortfalls, increased blackouts due to shortage of cash to buy fuel, the loss of key customers who have left the distribution grid, the accumulation of debt, and the curtailment of investment programs designed to maintain or improve levels of operational efficiency;
  - b. increased distribution losses and lower collection levels due to shifting the costs of electricity distribution to paying customers, who are reluctant to pay higher prices or who then decide that theft of electricity is a more attractive alternative than paying an electricity bill;
  - c. substantial financial losses due to the devaluation of the peso *vis-a-vis* the U.S. Dollar over time;<sup>35</sup>
  - d. forcing EDE Este to accumulate millions of dollars in debt to the generators from which it was purchasing electricity;

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<sup>35</sup> The Republic failed to pay the tariffs at the Dominican Peso-U.S. Dollar exchange rate at the time that the payments were owed. Instead, the Republic made those payments months or years later, so that EDE Este received substantially devalued pesos. In 2003, AES estimated exchange rate losses for the distribution companies at US\$130 million. See Sustainable Development of the Dominican Electrical Sector at 30 (March 2004).

- e. preventing EDE Este from making certain investments in the distribution system and expanding its operations in the portion of the island in which it operates; and
- f. destroying the value of Claimant's investment in EDE Este and depriving EDE Este of future cash flows and revenues by creating an enormous debt that the Republic claims that EDE Este owes to it, because CDEEE is treating the payments to EDE Este not as an indemnity, but as CDEEE's accounts receivable.

## **2. Unilateral Reduction of Unregulated Users' Minimum Demand Requirements**

90. The 1998 Tariff Resolutions provided that all customers with a capacity of less than two megawatts of electricity every month would be classified as "regulated users" subject to the tariff prices and structure established in the 1998 Tariff Resolutions. Customers who used more than two megawatts of electricity every month could be classified as "unregulated users," and they could negotiate directly with the electricity generators and purchase electricity directly from them through power purchase agreements ("PPAs"). Thus, the "unregulated users" constitute the larger consumers that are not subject to price regulation by the Republic. Unregulated users, who are not connected to the distribution lines, do not pay any electricity tariff to the distribution companies. Consequently, the greater the number of unregulated users, the lower the revenues for the distributors such as EDE Este.
91. Notwithstanding the 1998 Tariff Resolutions, in 2001, the Republic enacted Law 125-01, which unilaterally granted the SIE the power to modify unregulated users' minimum requirements. Law 125-01 dramatically and unilaterally expanded the potential class of "unregulated users."

92. Under Article 108 of the regulations enacted pursuant to Law 125, the minimum power demand for unregulated users was to be drastically phased down over time: 2.0 megawatts or less for 2002, 1.4 megawatts for 2003, 0.8 megawatts for 2004, and 0.2 megawatts for 2005.
93. Article 140 of the regulations to Law 125-01 also provided that certain customers could aggregate their consumption so as to reach the two megawatts required to be classified as an unregulated user.
94. EDE Este has repeatedly notified the Republic of its opposition and refusal to consent to these unilateral modifications of the 1998 Tariff Resolutions, and of the detrimental impact that these modifications will have on EDE Este. However, the Republic has either rejected or ignored EDE Este's requests for reconsideration.
95. In August 2006, the Republic implemented the first phase-down that Law 125 permitted.
96. The Republic's unilateral imposition of the phase-down described above has and will result in a significant financial and structural impact on EDE Este. It substantially expands the potential class and number of consumers who are exempted from the exclusive distribution system that was established by the Concession Agreement and as required by the capitalization contract. In addition, in the absence of the Second-Phase Tariffs, the substantial increase in unregulated users further shifts the financial burdens of the distribution system to regulated customers and to EDE Este.

### **3. Failure to Enforce EDE Este's Exclusivity Rights Within the Concession Area**

97. Despite the promise to enforce exclusivity rights within the concession area as set forth in the Concession Agreement, the Republic effectively is robbing the Claimant of its

guaranteed market-share by failing to enforce Claimant's rights, resulting in damages to the Claimant that are yet to be determined.

98. The Concession Agreement grants EDE Este the right to the exclusive distribution of electricity within 100 meters of the electricity grid on the designated eastern portion of the island (the "Territory"). See Concession Agreement, Article 4 & Annex 3: Description of the Territory.
99. The exclusivity granted by the Concession Agreement was part of the bargain that was given to EDE Este and its shareholders upon execution of the Agreement, and has remained in force throughout the life of the investment, including after purchase by the Claimant.
100. Notwithstanding EDE Este's numerous protests and requests for reconsideration, the Republic has failed to enforce and uphold the exclusivity requirements of the Concession Agreement. These violations include, but are not limited to, the following:
  - a. Under the Concession Agreement, only EDE Este may build and operate electricity substations in the Territory. However, with the knowledge and approval of the Republic, an electricity generator (Haina) has built a substation within 100 meters of EDE Este's grid. On April 12, 2004, EDE Este filed a protest and request for reconsideration with the Republic challenging Resolution SIE-05-2004 of January 20, 2004 and objecting to the authorization granted to build the substation, but there has been no response.
  - b. On July 3, 2002, November 15, 2002, January 10, 2003, December 27, 2005, March 29, 2006, and December 14, 2006, EDE Este complained to SIE regarding

encroachments into its exclusive distribution area, but the SIE failed to take action in accordance with these requests.

c. For the reasons set forth above, the Republic's unilateral reduction of unregulated users' minimum demand requirements and the aggregation of consumption in connection with that reduction also violates EDE Este's exclusivity rights.

101. The Republic's failure to enforce the exclusivity rights has caused and will continue to cause substantial damage to EDE Este over the life of the 40-year Concession Agreement.

102. If this ongoing wrongful activity does not cease, EDE Este will be irreparably harmed and suffer further damages.

#### **4. Failure to Pay Required Capital Contributions**

103. As part of its commitment to capitalize EDE Este, in 1999, the Republic promised to contribute valid title to certain property to EDE Este. However, the Republic failed to transfer legal title to property that it promised as part of the capitalization. These assets consist primarily of land but also include movable assets.

104. Despite the Republic's promises, and EDE Este's protests and requests for reconsideration, the Republic has failed to contribute the required amounts and full and valid legal title of all property to EDE Este.

105. Timely payment of the capital contributions would have permitted EDE Este to invest more heavily in the early days of its concession, thus reducing losses and allowing EDE Este to improve service levels.

106. As a result of these wrongful actions, EDE Este has been, and continues to be, wrongfully denied of the capital contributions necessary to the successful maintenance of its

business. The Republic currently owes approximately US\$106 million in capital contributions to EDE Este, not including in-kind contributions.

**B. The Republic's Failure to Enforce Its Laws and Protect EDE Este and its Representatives**

107. The Republic has failed to enforce the laws criminalizing the theft of electricity, which has been a severe and continuing problem in the Republic, as the Republic repeatedly has acknowledged.<sup>36</sup>
108. From March 1, 2007 to the present, EDE Este has suffered no less than US\$50 million in damages due to electricity theft. This reflects but a tiny fraction of the total amount of theft that EDE Este has suffered since 1999.
109. The prevalence of the theft and corruption in the electricity sector, and the refusal of the Republic to follow through on promised reforms, are well-documented.<sup>37</sup>

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<sup>36</sup> See, e.g., Information Memorandum at 69 (“Power losses in the Dominican Republic’s electrical power system are the sector’s principal operating problem. The high level of losses during the past decade has been due mainly to non-technical losses...”); *see id.* at 70 (“The main reasons for non-technical losses are . . . A significant number of illegal users, estimated at more than 400,000 [and a] lack of a ‘payment culture’ on the part of a large number of users, with more than 117 thousand customers who have not paid their electricity bills in 12 months and average late payments of 5.7 months.”); “Déficit de generación sube a 700 MW,” *Hoy*, 7 November 2003 (Superintendent of Electricity (Reinoso) attributed the electricity crisis to the lack of payment of the tariff subsidy, the fact that the distributors do not collect enough due to theft of electricity, and the Republic’s failure to pass through the real price of energy to users); “Distribuidoras de electricidad perdieron 40% de luz facturada,” *Listín Diario*, 10 Mar 2005 (Central Bank Report states that energy theft is one of the biggest problems for the electricity sector). See also “Violación de la Ley causa problemas en sector eléctrico,” *Hoy*, 30 April 2004 (President of the National Council of Private Enterprise stated that the failure to apply the General Electricity Law and to sanction violators is the principal cause of the problems affecting the electricity sector). See the September 2007 Dominican Republic Electricity Monitoring Quarterly Report at 35, Annex 4, “Overview of the Electricity Sector.”

<sup>37</sup> See 2006 World Bank Memorandum at 154, para. 298 (“Weak governance is the fundamental challenge facing the Dominican Republic today. It comprises a lack of transparency, low confidence in public sector institutions, corruption, lack of respect for the rule  
(continued...)”)

110. The Republic's failure to enact and enforce effective legal protections of electricity distributors is part of a pattern of ongoing and deliberate aggravation by the Republic of the economic and security problems that EDE Este has faced and continues to face by, among other things:
- a. Repeatedly declaring that the executives of EDE Este's co-owners should be "deported" from the Republic;<sup>38</sup>
  - b. Publicly disparaging the executives of EDE Este and other distribution companies and their co-owners;<sup>39</sup>
  - c. Encouraging consumers to ignore the timely and full satisfaction of their electricity bills;<sup>40</sup>
  - d. Unfairly and publicly attacking the distribution companies and wrongfully blaming EDE Este and the other distribution companies for blackouts, when in

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(...continued)

of law, non-compliance with regulations, ineffective oversight, and high transaction costs."). Moreover, the World Bank Investment Climate Survey of 2005 reveals that corruption is the second most important obstacle to investment, followed by "crime, theft and disorder." *Id.* at xvi, para. 40. The Republic also acknowledges its relatively low spending on deterrence and the low confidence in the judicial system among individuals and firms. *Id.* at 199, para. 396.

<sup>38</sup> See, e.g., "Ejecutivos AES merecen ser deportados," Hoy, 26 June 2004 (President Mejía declared that executives of AES Dominicana should be deported from the country); "Llevarán a AES ante la Justicia," El Caribe, 9 July 2004 (CDEEE representative declared that the owner of EDE Este should be "deported").

<sup>39</sup> See, e.g., "Responden a la Superintendencia," Hoy, 2 August 2004 (SIE spokesman declared owner of EDE Este a "cheat" and stated that its president was a "delinquent"); "Mejía: 'AES no tiene calidad moral para hablar de deudas,'" Diario Libre, 31 July 2004 (President Mejía stated that AES lacks "moral quality" and was part of a "dirty business").

<sup>40</sup> See, e.g., "Méndez dice Edes deben modernizar servicio al cliente," Listín Diario, 28 April 2005 (The Superintendent of Electricity (Mendez) declared that the distribution companies "do not have the right to suck consumers dry.").

fact the Republic's failure to pay or consumers' theft of electricity caused the blackouts;<sup>41</sup>

- e. Encouraging the population not to pay its electric bills, by, for example, allowing a provincial government to declare the executives of EDE Este to be *personae non grata* and to exhort the population not to pay for electric service;<sup>42</sup>
- f. Wrongly denying that the Republic owed money to EDE Este;<sup>43</sup>
- g. Engaging in and allowing systematic corruption in the Republic's electricity sector to continue;
- h. issuing Presidential Decree 749-02, which provided that, in effect, the distribution companies could only collect up to five months' worth of unpaid invoices from those consumers that have committed electricity fraud by means of fraudulent or

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<sup>41</sup> See, e.g., "Responsabiliza al Gobierno por el déficit en la generación eléctrica," El Siglo, 14 October 1999 (Rhadames Segura stated, "[t]his generation deficit, due to the lack of investment that should have been done a while back is attributable to the Government. We are all responsible for the deficit, because the CREP the Technical Secretary, and the CDE all work for the Government."); "Empresas Distribuidoras Marginan Totalmente CDE," El Caribe, 14 October 1999 (Segura stated that when the generation deficit was produced, the Government did not invest what was necessary to combat the deficit. This was the responsibility of the CREP, the Technical Secretary, and the CDE: "We were culpable for what occurred."); "Gobierno incumple acuerdo con AES," Hoy, 20 March 2004 (SIE's failure to pay amounts owed, not alleged manipulation by EDE Este, caused financial blackouts); "Robo de cables alta tensión provoca avería ingenio Consuelo," El Nacional, 27 February 2006 (Theft of high tension cables common and caused local blackouts).

<sup>42</sup> See, e.g., "Cabildo de SPM declara no gratos ejecutivos AES," El Nacional, 31 July 2004.

<sup>43</sup> See, e.g., "Calderon llama poco serio y descarado a ejecutivo AES," Hoy, June 12, 2004 (Secretary of Finance Calderón stated that Julian Nebreda, manager of AES Dominicana, was "not serious" and "shameless" for claiming debt owed by government); "Reconocen deuda con Edeeste," El Nacional, 18 January 2005 (SIE recognized that the government undoubtedly owes AES for nonpayment of subsidy, contradicting CDEEE's denials of that debt. SIE representative said he did not know why those amounts were not paid promptly, and noted that they prevented Ede Este from adjusting its tariff).

clandestine connections, and which (i) effectively granted retroactive immunity to thousands of individuals who were in breach of their contracts to pay EDE Este's electricity bills and wrongly interfered with EDE Este's accounts with these consumers, and (ii) provided an additional incentive to consumers to steal (and continue to steal) electricity in the future because the risk of getting caught was low and the penalties were minor in comparison to the potential benefit of what could be stolen;

- i. Notwithstanding its previous promises and obligations,<sup>44</sup> refusing to pay EDE Este the proper amounts owed for energy consumed by government facilities to which EDE Este was not allowed to cut service;<sup>45</sup>
- j. Knowingly allowing high-ranking officials of the Republic to refuse paying their own electric bills;
- k. Failing to prevent an EDE Este collection office from being burned by protesters;<sup>46</sup>

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<sup>44</sup> See, e.g., Information Memorandum at 67 ("The Government has publicly stated its intention to pay promptly all electric service at every level."); *id.* at 19 ("a private operator could realize substantial net gains from enforcing on time payment from the Government and the municipalities for their electricity consumed"); Proceso de Capitalización de la CDE, REF: CREP/CDE/01-98 Fase II-Adjudicación, Circular No. 40, Answer 1 (March 3, 1999) ("There is no Dominican legislation that allows any type of privilege in favor of the state institutions with respect to the consumption of energy, and they all have the obligation to pay for their consumption of energy. Nevertheless in the Share Subscription Agreement we expressly state the formal promise of the Republic to give its best effort so that the state institutions punctually satisfy their payment obligations.").

<sup>45</sup> See, e.g., "Reconocen deuda con Edeeste," El Nacional, 18 January 2005 (SIE acknowledged that certain government entities that cannot be cut owe debt to EDE Este).

<sup>46</sup> See, e.g., "Incendian la estafeta de Edeeste," Listín Diario, 2 July 2004.

- l. Exposing EDE Este's representatives to physical violence for attempts to collect unpaid electricity bills;<sup>47</sup> and
  - m. Issuing veiled threats that it may nationalize or otherwise take control of the management of EDE Este.<sup>48</sup>
  - n. Despite a clear and universally-understood recognition of the Republic's failure to address theft,<sup>49</sup> government officials continue to systematically dodge and deflect responsibility for theft in the electricity sector by attempting to blame distribution companies for problems perpetuated by the Republic.<sup>50</sup>
111. Notwithstanding EDE Este's numerous formal and informal requests and demands to the Republic and its related entities, the Republic has failed to enforce the law against customers who steal electricity from EDE Este.

<sup>47</sup> See, e.g., "Agreden brigadas de Edeeste y policías," El Nacional, 4 April 2005 (EDE Este repair teams stoned by protesters in various neighborhoods); "Brigidas de Edeeste son apedreadas en sectores," Diario Libre, 4 April 2005 (same); see also "Incendian la estafeta de Edeeste," Listín Diario, 2 July 2004 (EDE Este collection office to be burned by protesters for alleged failure to provide electricity).

<sup>48</sup> See, e.g., "AES sugiere fórmulas solución actual crisis energética," La Información, 14 November 2003 (CDEEE issues proposal that SIE intervene in the distribution companies over EDE Este's objection); "El Gobierno gestiona la entrada de tres plantas," El Caribe, 23 June 2004 (SIE suggested that it may intervene in Edeeste); "No hay salida "inmediata" para crisis de electricidad," Hoy, 26 October 2005 (government has not ruled out an intervention in EDE Este).

<sup>49</sup> See, e.g., "Hallan 4,814 conexiones ilegales," El Nacional, 28 July 2007 (The Director of PAEF revealed that there are 4,814 illegal connections, 754 arrests, 141 went to court, and only 12 people served prison time; under the current Director of PAEF, there have been 12,161 inspections. PAEF Director Delis del Pilar Hernández Peña notes that despite PAEF's efforts against electricity fraud, the justice systems sets free most of the accused within a few hours.); "PAEF ve jueces entropocen proceso judicial," El Nuevo Diario, 30 May 2007 (noting the weakness of the fight against electric fraud, in particular that of the 117 people brought to judicial authorities, only 6 have gone to prison).

<sup>50</sup> See Sesión de Camara de Diputados, 48 PLO 2007, 23 July 2007, Diputado Pelegrín Horacio Castillo Semán, Fuerze Nacional Progresista (stating that distribution firms, not electricity users and consumers, are practicing fraud).

- a. According to the Law 125, Article 24(e), one of the duties of the SIE is to “apply fines and penalties in case of non-compliance with the law, its regulations, norms and its instructions, pursuant to the Regulation.”
- b. On numerous occasions, EDE Este has complained to the Republic regarding the fraud and theft of electricity. For example, on May 9, 2002, EDE Este complained to the Republic that the government failed to take adequate steps to respond to the widespread fraud against EDE Este and the failure to prosecute illegal acts by individuals against EDE Este. Despite this complaint and similar communications with the Republic, the Republic has failed to take sufficient action to assist EDE Este. For example, the PAEF (the Programa Apoyo Eliminación del Fraude), which was a government agency created by Presidential Decree in 2002 that was designed to assist in reducing fraud, went unfunded and unused until the distribution companies funded the effort themselves.<sup>51</sup>

112. Although the Republic is and has been aware that its acts and omissions have fomented the problem of theft in the electricity sector, the Republic continues deliberately to flout its obligation to protect EDE Este in numerous ways. For example:

- a. on August 5, 2007, the Republic signed into law select portions of a General Electricity Law, which imposes fines and prison time for theft of electricity, (openly recognizing the failure of the judiciary to enforce the laws against electricity theft);<sup>52</sup> however, shortly before the law was to go into effect, the

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<sup>51</sup> See, e.g., “Edesur recurre al PAEF para enfrentar fraudes eléctricos,” Diario Libre, 21 February 2006.

<sup>52</sup> “Electricity Theft is Now a Felony in Dominican Republic,” Dominican Today, 7 August 2007; “Senado convierte en ley robo de energía,” El Día, 26 July 2007 (Senator Juan Orlando (continued...))

Republic suspended indefinitely the sanctions against theft, including fines and/or prison sentences;<sup>53</sup>

- b. the Republic continues to promise that it will settle arrears with distribution companies, and fails to do so;<sup>54</sup>
- c. the Republic's policies and practices (including corrupt practices), as set forth above, have contributed to higher electricity prices for those customers that do pay, and have encouraged the Republic's citizens to steal, rather than pay for, electricity.

113. Specifically, the Republic's numerous actions continue, among other things, (i) to undermine EDE Este's ability to collect payments from its customers, (ii) to damage the reputation of EDE Este, (iii) to prevent EDE Este from turning off electricity to customers who are not paying their invoices, (iv) to reinforce the culture of non-payment

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Mercedes, president of the Commission of Energy, stated “[the new energy theft law] is of great importance given that the energy losses as a result of theft are over 30% of the energy distributed and, with the implementation of legal mechanisms, non-technical losses will be reduced.”; “PAEF advierte aplicará ley robo energía,” *El Nacional*, 26 July 2007 (PAEF Director Delis del Pilar Hernández Peña notes that “with more support we understand that electric fraud can be combated with greater success,” also noting that the Dominican Republic has lacked a real legal framework that would permit a successful fight against delinquent acts that affect the good development of the national electricity system).

<sup>53</sup> “Dominican Electricity Thieves have only 90 more days,” *Dominican Today*, 3 December 2007 (“The authorities, according to Electricity Superintendent Francisco Mendez, have decided not to apply [the fines and prison time required under the General Electricity Law], at least for another three months[.]”).

<sup>54</sup> See Letter of Intent to the IMF (August 2003) at 8, para. 16 (“we aim to put in place a more comprehensive program to address the problems in the sector, including theft, transmission and distribution losses, and the past and current accrual of arrears...”); Letter of Intent to the IMF (January 2004) at 6, para. 10 (reform plan includes “the full regularization of arrears in the system.”); Letter of Intent to the IMF (April 2006) at 7, para 20, and 9, Table 1 (“We have recently signed a General Electricity Sector Agreement for 2006 in which ...the government agreed to remain current in paying its electric bills....”).

of electricity,<sup>55</sup> (v) result in physical damage to EDE Este's property, (vi) to expose the representatives of EDE Este to physical violence, (vii) to incite hostility, uncertainty, and violence against EDE Este, (viii) to impede efforts to decrease non-technical losses and improve means for increasing collections, (ix) to cause EDE Este's recovery rates and cash recovery index ("CRI") to decrease and its losses to increase, (x) to compound the existing problems in the electricity sector,<sup>56</sup> and (xi) to result in additional substantial economic harm to Claimant's investment in the Republic that continues so long as the Republic refuses to take promised actions against theft.

### **C. The Republic's Failure to Redress EDE Este's Complaints**

114. The Republic's intended channels for redress have failed to respond to EDE Este's numerous requests for relief. As set forth above, EDE Este has filed repeated formal protests and requests for reconsideration with the SIE, as well as appeals to the National Energy Commission (the "NEC"). These protests, requests for reconsideration, and appeals have either been summarily denied, many after a long delay, or ignored completely.

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<sup>55</sup> The Republic has expressly recognized the "cultura de no pago" problem. *See* Information Memorandum at 70 ("The main reasons for non-technical losses are . . . Lack of a 'payment culture' on the part of a large number of users, with more than 117 thousand customers who have not paid their electricity bills in 12 months and average late payments of 5.7 months.")

<sup>56</sup> *See, e.g., Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 (July 14, 2006) ¶ 144 ("... the reaction of the provincial authorities shows a total disregard for their own contribution to the algae crisis and a readiness to blame the Concessionaire for situations that were caused by years of disinvestment and to use the incident politically . . . It equally shows the willingness of high placed provincial officials, including the Governor, to interfere in the operation of the Concession for political gain by forcing ABA not to bill the customers. . . The Tribunal understands that governments have to be vigilant and protect the public health but the statements and actions of the provincial authorities contributed to the crisis rather than assisted in solving it.").

- a. Law 1494 provides that an aggrieved party may appeal an adverse decision against it to the appropriate appellate body. Article 14(d) of Law 125 provides that the NEC is the appropriate body to receive appeals from the SIE. However, neither the SIE nor the NEC has taken action upon those requests for reconsideration and appeals filed by EDE Este.
- b. Administrative Procedure Law 1494 provides that if the legal administrative decision issued by the NEC has not been in favor of the plaintiff, the petitioner may file an appeal to the “Chamber of Accounts” (the Cámara de Cuentas), which is empowered to review the legal administrative decisions made by the previous administrative bodies. However, to date, the Supreme Administrative Tribunal has not been formed to respond to the challenges that EDE Este has filed.

**D. The Republic’s Re-Nationalization of EDE Sur and EDE Norte**

115. In 1998, Unión Fenosa, a public Spanish company, was the highest bidder for EDE Sur and EDE Norte, the other two electricity distribution companies that the Republic capitalized in 1998. In 1998, Unión Fenosa paid a combined price of US\$210 million for a 50% ownership as well as the right to control EDE Sur and EDE Norte.
116. In September 2003, after consultations with the Government of the Kingdom of Spain, the Republic re-purchased Unión Fenosa’s 50% ownership in EDE Norte and EDE Sur for approximately US\$700 million. This re-nationalization resulted in the Republic’s resumption of complete ownership and control over EDE Sur and EDE Norte.
117. Like the United States, the Kingdom of Spain has enacted an investment treaty with the Republic.

118. As a result of the re-nationalization of EDE Norte and EDE Sur, DREH is currently the only foreign owner of an electricity distribution company in the Republic.

119. Since March 1, 2007, Claimant has requested that EDE Este be treated no worse in like circumstances than Unión Fenosa's investments, but the Republic has refused to do so.

**E. The Republic's Improper and Illegal Threats by the Dirección General de Impuestos Internos ("DGII") Against DREH**

120. On February 26, 2007, shortly after the DGII learned of the potential claims against the Republic and its instrumentalities in connection with this arbitration, the DGII launched an inquiry regarding the tax treatment of the DREH transaction — a transaction that occurred nearly two years earlier and of which the Republic was well informed of before it occurred. That inquiry continued past March 1, 2007, when CAFTA-DR entered into force for the Dominican Republic.

121. As the DGII was and is aware, and as representatives of the Dominican Republic have admitted, the actions of the Republic destroyed the value of EDE Este. The DGII's assertion of possible claims against DREH and related parties are, among other things, a transparent pretext for trying to obtain information and documents that are confidential, proprietary and irrelevant to DGII's responsibilities and a wrongful attempt to intimidate the Claimant from pursuing its claims.

122. The Republic's actions are precisely the kind of activity that international tribunals have condemned as a violation of fair and equitable treatment, full protection and security, and international law. For example, in *Pope & Talbot, Inc. v. Govt. of Canada*, the tribunal observed that Canadian officials' retaliation against the company after Pope & Talbot instituted an arbitration against the Canadian government was a violation of the North American Free Trade Agreement. The Tribunal observed that "[o]ne would hope that

such [threats and misrepresentations] would shock and outrage every reasonable citizen of Canada, as they did shock and outrage the Tribunal.”<sup>57</sup>

## VII. TCW’S CLAIMS AGAINST THE REPUBLIC

### A. The Republic’s Commitment to Protect Foreign Investment Under CAFTA-DR

123. CAFTA-DR is a multilateral agreement designed to encourage and protect foreign investment and to promote the rule of law. In the preamble to CAFTA-DR, the signatory countries, including the Republic and the United States, expressly resolved to:

**ENSURE a predictable commercial framework for business planning and investment;**

....

**PROMOTE transparency and eliminate bribery and corruption in international trade and investment;**<sup>58</sup>

....

(emphasis in original).

124. Moreover, in the first Chapter of CAFTA-DR, Article 1.2, the Republic agreed that:

**(1) The objectives of the Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to:**

...

**(d) substantially increase investment opportunities in the territories of the Parties;**

...

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<sup>57</sup> *Pope & Talbot, Inc. v. Govt. of Canada*, Award of Damages (NAFTA Ch. 11 Arb. Trib. May 31, 2002) ¶¶ 67-69.

<sup>58</sup> The Republic and the United States further affirmed their commitment to eliminating bribery and corruption in international investment in CAFTA-DR Article 18.7, entitled “Statement of Principle,” which states “[t]he Parties affirm their resolve to eliminate bribery and corruption in international trade and investment.”

**(2) The Parties shall interpret and apply the provisions of the Agreement in light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.**

125. The violations of CAFTA-DR must be viewed in light of these clearly-stated objectives of the Contracting Parties.<sup>59</sup>

126. The continuing wrongful actions of the Republic described herein were intentional, willful, evinced a reckless indifference to the rights of Claimant, DREH and EDE Este, and violated the principles and the specific provisions of CAFTA-DR.

**B. The Timing of the Republic's Conduct Under CAFTA-DR**

127. As set forth above, on March 1, 2007, CAFTA-DR entered into force for the Dominican Republic. Article 10.1 of CAFTA-DR states that the Chapter "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."

128. Claimant's claims are directed toward acts and facts that are legally actionable under CAFTA-DR. Among other things, CAFTA-DR unambiguously binds Parties

- (1) violations that *continue to exist* at the time that the Agreement entered into force, and
- (2) violations that occur after the date of entry into force.

129. The acts and facts set forth above are actionable under CAFTA-DR because they constitute continuing violations or violations that occurred after CAFTA-DR's date of entry into force on March 1, 2007.

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<sup>59</sup> See Article 31(1) of the Vienna Convention (a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

**C. The Republic's Actions Constitute an Expropriation in Violation of Article 10.7 of CAFTA-DR**

130. Article 10.7 of CAFTA-DR, entitled "Expropriation and Compensation," states in relevant part:

- 1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:**
  - (a) for a public purpose;**
  - (b) in a non-discriminatory manner;**
  - (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and**
  - (d) in accordance with due process of law and Article 10.5.<sup>60</sup>**

...

131. By requiring EDE Este to distribute electricity below its actual costs, particularly after promising indemnification and the Second-Phase Tariffs that would recognize electricity distributors' costs, the Republic has violated Article 10.7 of CAFTA-DR.

132. By treating payments to EDE Este as loans or other accounts receivable rather than as the promised indemnification, the Republic is engaging in a "creeping expropriation" of EDE Este through this accumulated debt, which is usurping the investment and depriving DREH and the Claimant of the value of its investment.

133. By repudiating its promise to keep the threshold for non-regulated users at two megawatts, the government is effectively expropriating EDE Este's best customers.

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<sup>60</sup> CAFTA-DR Article 10.7 incorporates Annexes 10-B and 10-C, which are included in Claimant's Exhibit 1.

134. By interfering with the operation and management of EDE Este, including but not limited to interfering with EDE Este's application of indemnity payments from the Republic and controlling EDE Este's budget process, the Republic has denied DREH of its rightful and effective control over EDE Este.

135. In the event of an expropriation, the expropriating state must indemnify Claimant as follows:

**2. Compensation shall:**

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

...

136. Such indemnification has not been paid by the Republic, especially with respect to the First- and Second-Phase Tariffs that it promised that it would implement as well as with respect to the indemnification that the Republic promised for its failure to implement the First- and Second- Phase Tariffs.

137. Through the actions described above, the Republic has expropriated and continues to deprive Claimant of its investment in EDE Este and of EDE Este's assets.

**D. The Republic's Actions Constitute a Violation of the Fair and Equitable Treatment Obligation in Article 10.5 of CAFTA-DR**

138. The Republic's ongoing actions constitute a violation of the "fair and equitable" treatment obligation in clear contravention of Article 10.5 of CAFTA-DR, entitled "Minimum Standards of Treatment." Article 10.5 provides:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including *fair and equitable treatment and full protection and security*.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “*fair and equitable treatment*” and “*full protection and security*” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “*fair and equitable treatment*” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;<sup>61</sup>

...

139. In particular, the Republic’s refusal to implement the tariff regime it had promised to encourage foreign investment, its refusal to make the capital contributions it promised, its changes to the regulatory regime without TCW’s consent, its failure to pay the indemnities it promised, the unilateral reduction of unregulated users’ minimum demand requirements, the failure to enforce EDE Este’s exclusivity rights within the concession area, its failure to curtail or deter the rampant theft of electricity from EDE Este, and its pretextual and transparent retaliation against TCW and its investment, all constitute violations of the fair and equitable treatment required under international law.

140. Through the actions described above, the Republic has violated Article 10.5 of CAFTA-DR and the Republic is continuing to destroy the value of EDE Este and deprive EDE Este of cash flows and revenues.

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<sup>61</sup> (emphasis added). CAFTA-DR Article 10.5 incorporates Annex 10-B, which is included in Claimant’s Exhibit 1.

**E. The Republic's Actions Constitute a Failure to Provide Full Protection and Security under Article 10.5 of CAFTA DR**

141. As quoted above, under Article 10.5 of CAFTA-DR, Parties must treat investments according to certain minimum standards of international law, including "full protection and security," which "requires each Party to provide the level of police protection required under customary international law."
142. By engaging in the actions described above, and over the ongoing objections of EDE Este, the Republic has violated the promise of full protection and security to EDE Este, DREH and the Claimant as provided for in Article 10.5 of CAFTA-DR.
143. In particular, the Republic has failed, and continues to fail, to provide the Claimant, DREH and EDE Este with the full protection and security and benefit of the 1998 Tariff Resolutions and similar laws, which the Republic has consistently affirmed and ratified in its representations to investors to the present day.
144. The Republic has also failed, and continues to fail, to provide full protection and security by refusing to pay EDE Este for electricity consumed by the Republic, by failing to enforce its laws that require EDE Este's customers to pay for the electricity they consume, by failing to implement new laws designed to reduce theft of electricity in the Dominican Republic, and by selectively and wrongfully targeting DREH in a pretextual and meritless investigation in retaliation for alleging claims against the Republic.
145. Through its actions, the Republic is continuing to destroy the value of EDE Este and deprive EDE Este of cash flows and revenues.

**F. The Republic's Actions Constitute a Denial of Justice in Violation of Customary International Law and Article 10.5 of CAFTA-DR**

146. The Republic's ongoing actions constitute a denial of justice in violation of customary international law and the fair and equitable treatment actionable under Article 10.5 of CAFTA-DR.<sup>62</sup>
147. Pursuant to Administrative Procedure Law 1494, upon denial of EDE Este's challenges to the SIE, the NEC was vested with the jurisdiction to determine whether these challenges were valid. Indeed, not only was the NEC vested with this jurisdiction, under Dominican law, it had an obligation to exercise that jurisdiction. Despite its existence as a valid body with an appointed membership, the NEC has never been constituted and has not decided these or any other claims brought by EDE Este.
148. By affirmatively refusing to hear or address the legitimate grievances of EDE Este, the Republic has engaged in activity that meets the classic definition of denial of justice claim — one that “no serious international lawyer contests.”<sup>63</sup>
149. As set forth above, the Republic's violations include, but are not limited to, the (1) expropriation of Claimant's investment by issuing loans or debt in place of promised indemnification and thereby incrementally acquiring control of EDE Este through an accumulation of accounts receivable to CDEEE, (2) failure to provide treatment

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<sup>62</sup> See, e.g., Jan Paulsson, *Denial of Justice in International Law* 4 (Cambridge University Press 2005) (“a state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”).

<sup>63</sup> See Paulsson at 65 (“delays which are ruinous or otherwise equivalent to refusal” constitute a denial of justice) citing Emerich de Vattel, *The Law of Nations or the Principles of National Law*, Book II, ¶ 350 (1916); see also Paulsson at 66 (“any shortcoming in the organization or exercise of the jurisdictional function which involves a failure of the state to live up to its international duty of extending judicial protection to foreigners”) (quoting Charles de Visscher, *Le déni de justice en droit international*) (1935).

comparable to the treatment accorded to Unión Fenosa, a foreign investor in EDE Norte and EDE Sur; (3) failure to provide treatment comparable to the treatment accorded to EDE Norte and EDE Sur since their renationalization; (4) failure to provide fair and equitable treatment; (5) failure to provide full protection and security by repudiating its representations and promises to the Claimant and refusing to enforce the laws of the Dominican Republic to protect Claimant's investment; (6) failure to meet the standards of customary international law, including by the Republic's engagement in a denial of justice.

**G. The Republic's Actions Constitute a Violation of Most Favored Nation Treatment Obligation in Article 10.4 of CAFTA-DR**

150. Article 10.4 of CAFTA-DR, which is entitled "Most-Favored-Nation Treatment," states in relevant part:

**1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.**

**2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.**

151. This broad Most-Favored-Nation ("MFN") provision — which expressly applies to both "investors" and "investments" — is reflected in Article 10.4 of CAFTA-DR. This MFN provision obliges a host state to treat investors and investments from one foreign country no less favorably than investors from other foreign

countries. The fundamental purpose of the MFN protection is “to guarantee equality of competitive opportunities for foreign investors in a foreign state.”<sup>64</sup>

152. The Republic’s continuing refusal of Claimant’s request that EDE Este be treated no worse in like circumstances than Unión Fenosa’s investments constitutes a violation of MFN treatment under Article 10.4 of CAFTA-DR and international law.

**H. The Republic’s Actions Constitute a Violation of National Treatment Under Article 10.3 of CAFTA-DR**

153. Article 10.3 of CAFTA-DR, entitled “National Treatment,” states in relevant part

**1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.**

**2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.**

**3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by the regional level of government to investors, and to investments of investors, of the Party of which it forms a part.**

154. The Republic’s wrongful conversion of the amounts owed to EDE Este into loans or other accounts receivable constitutes (among other things) the Republic’s failure to treat the investment of TCW as favorably as it accords to domestic investors and investments in like circumstances. The Republic’s wrongful conversion of subsidies into loans and

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<sup>64</sup> See, e.g., Jürgen Krutz, “The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: *Maffezini v. Kingdom of Spain*,” in *International Investment Law* (Todd Weiler, ed.) 523 (2005).

accounts receivable exploits the private foreign ownership of EDE Este in favor of EDE Norte and EDE Sur because the Republic intends for EDE Este to repay those monies, but it similarly knows that EDE Norte and EDE Sur, as state-owned agents of the Republic, need not.

155. Thus, the Republic's continuing refusal to accord to EDE Este the benefit of indemnification payments that it accords to EDE Norte and EDE Sur constitutes a violation of Article 10.3 of CAFTA-DR.

\* \* \*

156. As set forth above, Claimant has suffered damages resulting from, among other things, (a) the Republic's treatment of payments to EDE Este as loans and other accounts receivable rather than as indemnification, (b) its failure to pay other promised indemnification to EDE Este, (c) the Republic's unilateral reduction of the unregulated users' minimum demand requirements, (d) the Republic's failure to enforce EDE Este's exclusivity rights within the established concession area, (e) the Republic's failure to implement and enforce the laws and protect EDE Este against electricity theft, and (f) the Republic's failure to treat EDE Este comparably with investments of foreign and national investors in like circumstances.

#### **VIII. CLAIMANT'S DAMAGES AND ITS REQUEST FOR RELIEF**

157. In accordance with Article 10.26 of CAFTA-DR and Article 3(3)(f) of the UNCITRAL Arbitration Rules, TCW respectfully requests that the Tribunal make an award:
- a. finding that the Republic:
    - i. breached its obligations under CAFTA-DR Article 10.7 as described above;

- ii. breached its obligations under CAFTA-DR Article 10.5 and customary international law as described above;
  - iii. breached its obligations under CAFTA-DR Article 10.4 as described above; and
  - iv. breached its obligations under CAFTA-DR Article 10.3 as described above;
- b. declaring that the amounts that the Republic wrongfully forces EDE Este to carry on its books as accounts payable to the Republic are in fact the Republic's indemnification of EDE Este for the promised tariffs and subsidies, and:
- i. award Claimant no less than US\$500 million to compensate for the accounts payable that the Republic forces EDE Este to carry on its books and for other amounts that the Republic owes as indemnification to EDE Este; or
  - ii. in the alternative to (b)(i) immediately above, convert those accounts payable to revenues for EDE Este or eliminate the accounts payable altogether, as appropriate, as partial compensation for Claimant's damages due to the Republic's wrongful conduct; and
  - iii. in addition to (b)(i) or (b)(ii) above, award claimant for losses continuing so long as the violations set forth above continue to exist;
- c. in the alternative to paragraph b immediately above (only), awarding Claimant not less than US\$125 million for the loss of EDE Este's revenues and cash flow since March 1, 2007, and for losses continuing so long as the violations set forth above continue to exist; and

- d. requiring the Republic to pay the US\$106 million that it has failed to make in capital contributions to EDE Este; and
  - e. awarding Claimant pre-judgment and post-judgment interest, as appropriate, on the amounts owed by the Republic to Claimant; and
  - f. awarding Claimant its attorneys' fees from its counsel in the United States and the Republic; and
  - g. requiring the Republic to bear the costs and expenses of the arbitration, including fees and expenses of legal counsel, experts, consultants and witnesses, and the fees and expenses of this Tribunal; and
  - h. ordering any further or other relief the Tribunal may consider appropriate.
158. The Claimant continues to reserve fully its rights to amend or supplement its claims, and this Statement of Claim is served without prejudice to those rights.

Respectfully submitted,



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